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No. 87-931

In The
Supreme Court of the United States
October Term, 1987

THEODORE S. PROUD, JR.,
Petitioner,

v.

GREYCAS, INC., a corporation,
Respondent.

PETITIONER'S REPLY BRIEF

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ARGUMENT

I.

RESPONDENT MAY NOT RECOVER WHERE IT WAS REPRESENTED BY ITS OWN ATTORNEYS.

Respondent erroneously states that the credit committee's direction that its own attorney should conduct the title search "merely documented" that a title search was a requirement of the loan (Brf. 2). Respondent further states that there was "competent testimony in explanation of the minute" and that it was "taken care of" by respondent's attorneys by leaving it up to the borrower's attorney (Brf. 2). The record shows otherwise. The direction by the Credit Committee to its own attorneys was as follows:

> A U.C.C. search must be conducted by the legal staff on used equipment.

Curt Brueckner, attorney for respondent, testified that he never asked his client what was meant by this directive, but that he understood this as a reference to the usual practice of having the borrower's attorney conduct the search. No member of the credit committee testified as to the meaning of this directive.[1] Irving Hymson, then Brueckner's supervisor and also responsible for this loan transaction, testified that on occasion the legal staff did conduct legal searches itself, contrary to its usual practice of relying on the other side. Respondent's assertion that the above directive was simply a documentation of the usual practice and procedure is not supported by this record.

Notably, the respondent has not attempted to rebut, either by reference to the record or to Illinois law, the uncontested fact that at all times the respondent was represented by its own attorneys. Instead, respondent seeks to avoid Illinois law on the element of "justifiable reliance" by stating that none of the cases cited to by petitioner involved professional malpractice (Brf. 6). In fact, there are three Illinois cases which hold that where a party is represented by counsel, any reliance on the other side's attorney is unjustified as a matter of law (Pet. 16-17). Two more cases discussed by petitioner, *Bloomer Amusement Co. v. Eskenazi*, 75 Ill.App.3d 117, 394 N.E.2d 16 (1979) and *Practical Offset, Inc. v. Davis*, 83 Ill.App.3d 566, 404 N.E.2d 516 (1980) hold that a party to a loan transaction may not rely on the other side's attorney to take the necessary steps to protect his own interests.

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[1] One member of the credit committee, Carole Sullivan, was asked this, but the objection to the question was sustained at trial when the evidence deposition was offered.

The respondent, like the district and appellate courts, ignores the vital fact that it was represented by its own attorneys. This fact, because this is a negligence action, defeats any duty owed by the petitioner to the respondent, eliminates any right the respondent had to rely, and bars any recovery, except against its own attorneys.

II.

RESPONDENT HAS A VIABLE ACTION AGAINST THE CO-SIGNER AND GUARANTOR OF THE LOAN.

Respondent also asserts it was "clearly established" that there was no cause of action against the co-signer, the borrower's wife, because her signature had been forged (Brf. 3,7). Petitioner respectfully disagrees. Although there was some evidence that her signature had been forged on the loan agreement, she also signed a personal guarantee for this loan. There was no evidence to show that the personal guarantee was not signed by her. The district court made no findings on the claimed forgery of the loan agreement.

The borrower's wife not only received $ 14,000 as a spouse's award in the probate court, but was also the beneficiary of two trusts, totalling $ 2.25 million from life insurance proceeds.[2] Thus, respondent has a viable cause of action against the guarantor of this loan, and has yet to sustain damages.

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[2] Petitioner agrees with respondent that the $4.0 million in insurance proceeds will not become part of the estate for the purpose of satisfying creditors' claims, after further review of the testimony. However, the guarantor was beneficiary of $2.25 million of these proceeds to be held in two trusts.

III.

THE ADMISSION AND PRECLUSIVE EFFECT GIVEN TO THE STATE COURT JUDGMENT VIOLATES 28 U.S.C. § 1738 AND THE DUE PROCESS CLAUSE.

Respondent does not challenge petitioner's analysis of the law as to the doctrine of collateral estoppel, but instead states that because it did not assert the doctrine by name, it somehow was not applied. It cannot be contested that the district court, in its findings, gave the prior state judgment preclusive effect.[3] Nor can it be contested that the Seventh Circuit held that a prior state court judgment is admissible in a federal court even though a state court would not have deemed it either admissible or binding on a non-party. Because the petitioner was not a party to the prior state action and had no opportunity to litigate the issues in the prior state suit, it is a violation of petitioner's due process rights to hold him conclusively bound to that judgment. *Kremer v. Chem. Const. Co.*, 456 U.S. 461, 481-83 (1982).

The claim that there is no federal question presented as to this issue (Brf. 7-8) is undercut by respondent's citation to 28 U.S.C. § 1738, not to mention the constitutional question of due process. Section 1738 operates to make the doctrines of *res judicata* and collateral estoppel applicable in federal courts when there has been a state court determination. *Kremer*, 456 U.S. at 481 n. 22. The effect of a prior court judgment is, however, subject to that state's law. *Kremer*, 456 U.S. at 481. Because in Illinois the doctrine of collateral estoppel would not apply, nor would the judgment be admissible, a federal question as to 28 U.S.C.

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[3] The judgment was the only document admitted into evidence to prove that there was a loss of collateral. Contrary to respondent's implication, not all records of the Recorder of Deeds were admitted into evidence, although the index was. What was not admitted was the other financing statements of other creditors, which would have been competent evidence.

§ 1738 and constitutional principles is raised.

Respondent cites to *Illinois Steel Co. v. Industrial Comm'n*, 290 Ill. 594, 125 N.E. 252 (1919) for the proposition that a stranger to that proceeding may be affected by a judgment in an in rem proceeding (Brf. 8).[4] The Illinois Supreme Court's holding was:

> A judgment may be offered in evidence against one who was neither party nor privy to the suit in which it was rendered for the purpose of establishing the fact of its own rendition and those legal consequences which would result from that fact, *but there is a material difference between proving the existence of a record and using the record to prove matters of fact found by it. A judgment cannot be introduced in evidence to establish the facts upon which it has been rendered except against parties to the suit or their representatives, because no one can be affected by proceedings to which he is a stranger* unless the judgment is upon some subject of a public nature, as in the case of inquisitions on behalf of the public, which are in the nature of proceedings in rem. (emphasis added).

Illinois Steel, 290 Ill. at 595-96, 125 N.E.2d at 253. The court then went on to hold that an order entered in probate court declaring a woman to be the deceased's wife was inadmissible in a proceeding before the Industrial Commission, which was to decide who was entitled to compensation under a workmen's compensation statute. *Illinois Steel*, 290 Ill. at 596, 125 N.E.2d at 254.

Without citation or explanation, respondent asserts that the state court proceeding was "unquestionably an in rem proceeding" (Brf. 8). It is impossible to determine from this broad statement what the respondent's position

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[4] The 135-year old case also cited by respondent is inapposite. In *Pile v. McBratney*, 15 Ill. 314, 319 (1853), the court held that jurisdiction may be obtained through notice by publication. Service through publication is not the issue in this case.

is as to case law involving *in rem* proceedings as applied to the issues presented in this case. *See, Shaffer v. Heitner*, 433 U.S. 186, 196-212 (1977). Assuming, *arguendo* there was any applicability, an assertion of jurisdiction still must meet constitutional mandates, and a court cannot assert jurisdiction and affect interested parties unless due process standards have been met. *Shaffer*, 433 U.S. 407, 409.

CONCLUSION

For the foregoing reasons, and those stated in the Petition, this Court should grant the Petition and give this matter its plenary consideration.

Respectfully submitted,

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